November 9, 2022

ADR Case Update 2022 - 20

Federal Circuit Courts

- **GRIEVANCE WAS ARBITRABLE UNDER CBA**

  United Food & Commercial Workers, Local 1995 v Kroger Co.
  United States Court of Appeals, Sixth Circuit
  2022 WL 7965062
  October 14, 2022

  Kroger Limited Partnership I (KLPI), an entity within The Kroger Company family (Kroger), operates all Kroger retail stores in Tennessee and has its own CBA with the Union. Kroger's Supply Chain Division (SCD), which operates distribution warehouses for Kroger, opened a new "eCommerce Store" in Knoxville. The eCommerce Store was staffed by employees from an outside company, Vitacost.com, who filled and delivered orders placed by Walgreens pharmacies. The Union, likening these employees to retail workers, filed a grievance demanding that KLPI extend them Union benefits. KLPI refused to process or arbitrate the grievance, and the Union sued to compel arbitration under the CBA, which required arbitration of all disputes concerning "the interpretation or application of" the CBA. Following KLPI's answer, the Union moved for judgment on the pleadings. The court held that the Union's claim was arbitrable and ordered arbitration. KLPI appealed.

  The United States Court of Appeals, Sixth Circuit, affirmed the arbitration order. At dispute was whether the eCommerce Store was a Kroger retail store within the coverage of the CBA, in which case the Union would be the sole bargaining agent for all employees who worked there. This question fell squarely within the substantive scope of the CBA's arbitration agreement, which mandated arbitration of disputes requiring "interpretation or application" of the CBA. The Court, therefore, applied a presumption of arbitrability, rebuttable only by an "express provision" excluding a grievance from arbitration or where there is "forceful evidence of a purpose to exclude" the claim. KLPI argued that the CBA expressly excluded the Union's claim by establishing the Union as representative only for KLPI grocery stores, defining "bargaining-unit" work solely in terms of "retail establishments," and authorizing workers to handle products distributed "through Kroger distribution system." This language, KLPI argued, necessarily excluded Vitacost.com employees working in a warehouse pursuant to SCD's distribution system. The Court held that these provisions did not constitute a "clear and unambiguous" exclusion sufficient to rebut the presumption of arbitrability, especially as the cited provisions actually demonstrated that the dispute went to the merits of the Union's grievance rather than to threshold arbitrability. KLPI argued that the court below erred in granting the Union's motion without discovery that would have produced "forceful evidence" showing that the CBA did not apply. KLPI had failed to make these allegations in its answer, and they could not be considered on appeal. Finally, the court's jurisdiction was not preempted by the NLRB, as the issue was solely contractual, arising under the CBA's "new-store" clause, and did not constitute an "initial

decision in the representational area" subject to the NLRB's exclusive jurisdiction.

- **NOTICE OF REMOVAL WAS TIMELY, AND CLAIMS SUBJECT TO ARBITRATION**

  Rock Hemp Corp. v Dunn
  United States Court of Appeals, Seventh Circuit
  2022 WL 6634565
  October 11, 2022

  Rock Hemp contracted to purchase 6,000 hemp seeds from CBDINC, a d/b/a business name used by three individuals (Appellees). Rock Hemp filed a state court breach of contract action, naming no specified damages amount, against Appellees individually, alleging that they had misrepresented the seeds' quality. On the eve of discovery, Rock Hemp's counsel sent an email notification to Appellees' counsel stating that Rock Hemp was seeking $250,000 in damages. Appellees then removed the case to district court. Rock Hemp moved to remand, arguing that Appellees had missed the 30-day removal deadline. Appellees moved to dismiss for failure to comply with the purchase agreement's arbitration clause. Rock Hemp opposed, claiming that the contract was void because CBDINC, as a "d/b/a," lacked power to enter into valid contracts and on grounds of fraudulent inducement. The court granted the Appellees' motion to dismiss, holding that they had timely exercised their removal rights after being notified of the damages amount and that Rock Hemp's claims were subject to arbitration. Rock Hemp then filed a Rule 60 motion for reconsideration, arguing for the first time that Appellees lacked a Wisconsin seed labeler's license and renewing an earlier demand for a jury trial. The court denied the motion, finding that it inappropriately raised new evidence and arguments. Rock Hemp appealed.

  The United States Court of Appeals, Seventh Circuit, affirmed, finding that the defendants' notice of removal was timely and Rock Hemp's claims were subject to arbitration. Although the case may have been eligible for removal at the time of the complaint, the 30-day clock on removal did not begin to run until Rock Hemp's counsel "affirmatively and unambiguously" identified the damages amount in his email. Appellees did not waive their right to removal by complying with the state court litigation as, until they had received that email, they had no reason to believe that "any other jurisdiction was available to them." CBDINC's d/b/a status did not void the contract, as Wisconsin law allows a d/b/a entity to enter into and enforce a contract. Because there was no dispute that CBDINC was simply a name under which defendants did business, the Court concluded that defendants were real parties to the agreement and entitled to enforce the arbitration clause. Rock Hemp's fraudulent inducement argument, based on Appellees' alleged misrepresentation of seed quality, constituted a challenge to the contract as a whole rather than to the agreement to arbitrate. The court did not unreasonably deny Rock Hemp's reconsideration motion, as Rule 60 does not permit reconsideration based on new evidence absent a showing that the evidence could not have been discovered earlier. Renewal of Rock Hemp's jury trial request did not render the prior ruling reviewable, as by granting the motion to dismiss, the lower court concluded that no claims remained to be tried

California

- **DEFENDANT WAIVED RIGHT TO INVOKE ARBITRATION AFTER LITIGATING FOR SEVENTEEN MONTHS**

  Davis v Shiekh Shoes, LLC
  Court of Appeal, First District, Division 2, California
  2022 WL 16546189
  October 31, 2022

  In March 2019, sales associate Britani Davis sued her employer, Shiekh Shoes, and a colleague, Danilo Ensuncho, for employment violations based on ongoing sexual harassment. In answering the complaint, Shiekh asserted the arbitration agreement in Davis's employment contract as an affirmative defense but proceeded to defend the litigation. Shiekh filed a case management statement requesting a jury trial and estimating that the case would be ready for a 5-7 day trial within 12 months. Shiekh complied with discovery requests and engaged in meet-and-confer

discussions. Beginning in January 2020, Shiekh was unrepresented by counsel for seven months, during which time it filed no opposition to Davis's motion to continue the trial date. Shiekh hired a new attorney the following August and, in September, stipulated to Davis's motion for continuance, stating that Shiekh required additional time for discovery and trial preparation. In October -- 17 months after the initial complaint -- Shiekh moved to compel arbitration and stay the action. The court held that Shiekh had waived its arbitration rights based on its findings that Shiekh's actions were inconsistent with the right to arbitrate. Shiekh appealed.

The Court of Appeal, First District, Division 2, California, affirmed that Shiekh had waived its right to invoke arbitration. The Court noted that, while the appeal was pending, the Supreme Court had issued *Morgan v Sundance* holding that, under the FAA, a court could not condition waiver on a finding of prejudice. To the extent that the lower court conditioned waiver on a showing of prejudice, that finding was unauthorized under the FAA. In supplemental briefings, however, neither party requested remand based on the change of law but properly suggested that the lower court's decision could be affirmed on other legal grounds. The crux of Shiekh's appeal was that its delay in seeking arbitration was not inconsistent with the right to arbitrate because 1) Shiekh had lacked counsel for several months; 2) there had been pandemic-related reductions in court operations, and 3) its participation in the litigation had been "de minimis" based on its belief that Ensuncho was the "primary target." The trial court properly rejected all three grounds based on substantial evidence. Shiekh provided no explanation for pursuing litigation with its initial counsel or why, once that relationship had terminated, it delayed in retaining new counsel. Although "non-essential court operations" were paused between March and June of 2020, the case was at that time in the pre-trial phase, and the court's law and motion department continued deciding motions throughout. Shiekh's argument that Ensuncho seemed to be the "primary target" of the litigation was "specious." The record showed that only one claim in the complaint was alleged against Ensuncho, while every other cause of action was alleged against Shiekh. While Shiekh claimed to believe that its role in the litigation to be ancillary, one "could as easily infer" that Shiekh was waiting to see how Davis's case against Ensuncho proceeded before deciding "whether it would be better off in arbitration." The absence of a reasonable explanation for delay is a "significant factor weighing in favor of finding waiver," particularly when paired with seventeen months of motions practice and discovery during which Shiekh "never once suggested" its intention to arbitrate. Whether Shiekh "realized its arbitration rights too late" or sought to "resort to arbitration" when it realized litigation "would not be advantageous," the lower court did not err in characterizing Shiekh's actions as inconsistent with an intent to arbitrate.

- **EMPLOYER COULD NOT ENFORCE ARBITRATION AGREEMENT MADE UNDER UNREGISTERED AND MISLEADING FICTITIOUS BUSINESS NAME**

Villareal v LAD-T, LLC
Court of Appeal, Second District, Division 7, California
2022 WL 12004855
October 20, 2022

When Albert Villareal began a sales job with Toyota of Downtown LA, owned by LAD-T, LLC, he signed an Employment Agreement with "DT Los Angeles Toyota." Villareal sued LAD-T after being terminated immediately following a request for medical leave. LAD-T moved to compel arbitration under the Employment Agreement. In opposition, Villareal argued that DT Los Angeles Toyota was not a legal entity or fictitious business name capable of contracting or consenting to arbitration and that it was barred from enforcing the agreement under Cal. Bus. & Prof. Code § 17918, which provides that a party using a fictitious business name cannot "maintain any action upon or on account of any contract made" under that name unless or until it has filed a fictitious business name statement. LAD-T responded that DT Los Angeles Toyota was merely an "internal dba" used for expediency at the time the dealership was purchased and that "minor variations" in its name did not invalidate the Employment Agreement because Villareal clearly understood that he had been working for the dealership. The court found the existence of an agreement to arbitrate but held that LAD-T was barred from enforcing the agreement under § 17918. LAD-T appealed.

The Court of Appeal, Second District, Division 7, California, vacated and remanded. The Court took judicial notice of the fact that, while the appeal was pending, LAD-T had filed a fictitious business name statement for DT Los Angeles Toyota and was no longer barred from bringing an enforcement action under § 17918. LAD-T requested reversal on this basis. Villareal argued

instead that the appeal be dismissed as moot but that LAD-T should be barred from filing a second motion to compel because it had lacked due diligence in filing the statement. The Court held that the appeal was not moot, as the lower court had properly denied the motion to compel. LAD-T had used an unregistered business name to contract with its employees and made no efforts to amend those contracts once its "internal dba" was no longer necessary. The issue was not enforceability but whether § 17918 "allows a company to deviate from a registered fictitious business name without a new registration." § 17918 was intended to ensure that a party knows the "true identity" of the party with whom they are contracting. Under case law, no new registration is required for very minor truncations that do not obscure the party's identity. "DT Los Angeles Toyota," however, was not a "minor abbreviation" or truncation of "Toyota of Downtown LA." The name could refer to any Toyota entity in the L.A. area and did not ensure that Villareal knew the true identities of the parties behind it. Villareal did not waive his registration argument by failing to raise it within the statutory 10-day deadline for responding to a petition for arbitration. That deadline is triggered by a petition to commence an arbitration proceeding, not by a motion to compel arbitration during an existing action. Villareal properly asserted his defense at the first opportunity to do so when opposing LAD-T's motion to compel. The FAA did not preempt § 17918. The FAA provides that arbitration agreements be "as enforceable as other contracts, but not more so," and § 17918 applies to all contracts, not just arbitration agreements. The Court agreed with Villareal that LAD-T had failed to act diligently in filing its fictitious business name statement. Defendant was made aware of this failure on May 18, 2021, in Villareal's opposition to its motion to compel; the court denied the motion for that reason on June 1, and LAD-T filed its notice of appeal on June 18. But LAD-T did not file its fictitious business name statement until June 27, 2022, well after Villareal had filed his respondent's brief. Further, LAD-T provided "no explanation for why they would vigorously defend their position that no fictitious business name statement was required, including appealing the trial court's order, then abandon this position at the eleventh hour by filing the very statement that could have enabled the case to proceed to arbitration a year earlier." Rather than affirm the lower court decision, enabling LAD-T to file a second motion to compel and further delay trial proceedings, the Court vacated the order and directed the lower court, on remand, to consider the narrow issue of whether LAD-T had waived its right to compel, with attention to LAD-T's invocation of the appellate process and "whether LAD-T's late change in position was made in bad faith."

- **DEFENDANT WAIVED ARBITRATION RIGHTS**

Leger v R.A.C. Rolling Hills L.P.
Court of Appeal, Fourth District, Division 1, California
2022 WL 10328841
October 17, 2022

When Mary Leger was admitted to ActivCare's residential care facility, her daughter and conservator Karen Ochoa signed an arbitration agreement on Leger's behalf. On March 10, 2020, Leger served ActivCare with a complaint for elder abuse, claiming that ActivCare's negligence had left Leger emaciated and unable to walk. Leger then filed a motion for trial preference requesting an accelerated trial schedule. Leger, then 90 years old and infirm, appeared unlikely to outlive lengthy arbitration or litigation and, she alleged, needed the financial recovery to afford better care and rehabilitation. ActivCare answered the complaint on April 6, alleging the existence of a binding arbitration agreement as one of multiple defenses, and soon after filed its opposition to the trial preference motion. ActivCare claimed that an accelerated schedule would be prejudicial, as elder abuse cases typically take 18 to 20 months, and that it could comply with an accelerated schedule only if granted a list of 12 "accommodations," including shortened notice for summary judgment motions, informal discovery exchange, and Leger's agreement not to quash any subpoenas to her healthcare providers. The court granted Leger's trial preference motion on April 22 and set trial for August 19. ActivCare demanded a jury trial and then, on April 25, demanded arbitration. Leger refused and, when ActivCare moved to compel, opposed on waiver grounds. At the hearing, ActivCare claimed that it had not demanded arbitration earlier because it "needed to obtain the entire arbitration agreement and confirm that Ochoa had the authority to bind Leger." The court held that ActivCare had waived its arbitration rights. Although ActivCare's delay in initiating arbitration was "comparatively minor," it was "unreasonable, manifest and prejudicial" in Leger's unique circumstances. ActivCare had made no mention of an intent to arbitrate in its previous filings, and its accommodations requests were inconsistent with an intent to invoke arbitration. The court noted that expedited arbitration might accommodate Leger's needs but that it lacked the authority to order arbitration to be expedited.

ActivCare appealed.

The Court of Appeal, Fourth District, Division 1, California, affirmed that ActivCare had waived its arbitration rights. To invoke arbitration, a party must 1) "raise the defense and take affirmative steps to implement the process" and 2) "participate in conduct consistent with the intent to arbitrate." ActivCare provided no reason for waiting until after the court's trial preference ruling to demand arbitration. The Court rejected ActivCare's claim that it did not confirm Ochoa's authority to bind Leger arbitration until late April. ActivCare knew of Ochoa's conservator status in 2020 when she signed her mother's admissions documents and the arbitration agreement, and ActivCare asserted the existence of a valid arbitration agreement as a defense in early April. ActivCare could have expressed its intention to arbitrate in its pleadings or by filing a petition to compel arbitration to be considered simultaneously with Leger's trial preference motion. Instead, ActivCare opposed the accelerated schedule, requested accommodations if acceleration were granted, and demanded a jury trial. Having thus "progressed the litigation machinery" – with motion discovery, expert exchange deadlines, and trial conferences already in place -- ActivCare then waited to see whether the court would deny the accelerated schedule, knowing that result would put pressure on Leger to settle. ActivCare's actions were, therefore, inconsistent with an intention to arbitrate, as a litigant may not "test the waters" of litigation only to go elsewhere if those waters prove "too chilly."

New York

- **AMBIGUOUS CONTRACTS RAISED OPEN QUESTIONS OF FACT AS TO WHETHER PARTIES AGREED TO ARBITRATE**

  Ferraro v East Coast Dormer, Inc.
  Supreme Court, Appellate Division, Second Department, New York
  2022 WL 6846570
  October 12, 2022

  Homeowner Steven Ferraro sued his builder, East Coast Dormer, for negligently installing a modular addition in his home. East Coast then sued the modular's manufacturer, Signature Building Systems, for indemnification and contribution. Signature moved to compel arbitration and dismiss the third-party complaint. Signature relied on the arbitration provision in a Home Purchase Agreement it had executed with East Coast five years earlier, which, Signature contended, governed every subsequent project between the two parties. The court granted the motion to compel and dismissed the third-party complaint. East Coast appealed.

  The Supreme Court, Appellate Division, Second Department, New York reversed and remanded for the lower court to determine questions of fact existing as to whether the parties agreed to arbitrate. The Home Purchase Agreement signed five years before the transaction at issue included no provision that "unambiguously" stated that the Agreement would apply to all future projects. Although the parties executed a form agreement specific to the Ferraro addition, which contained language purporting to incorporate the terms and conditions of a home purchase agreement, the parties did not fill in the blank spaces in which they were to name the party to be bound and the date of the home purchase agreement to be incorporated. These documents did not evince a "clear, explicit, and unequivocal" agreement to arbitrate and the Court directed the lower court, on remand, to hold a framed-issue hearing and make a new determination of Signature's motion to compel. The lower court erred in granting the motion to dismiss the third-party complaint. An agreement to arbitrate is not a defense to an action and may not provide the basis for a motion to dismiss. If the lower court were to find the existence of a valid arbitration agreement, the proper remedy would be to issue an order compelling arbitration, which would operate to stay the action.

Georgia

- **ARBITRATOR DID NOT OVERSTEP AUTHORITY**

  Adventure Motor Sports Reinsurance, Ltd. v Interstate National Dealer Services, Inc.
  Court of Appeals of Georgia
  2022 WL 10225606
  October 18, 2022

  Robert Hardwick owned a motorsport vehicle dealership, Mountain Adventures (MA), which contracted to sell INDS service contracts to MA's retail customers. Under the contract, MA set the retail price, remitted to INDS a Contract Cost set forth on a Rate Card, and INDS administered the contracts and paid vehicle repair claims. INDS used the Contract Cost payments for cash reserves required by its underwriters, but also to cover administrative costs, insurance agent commissions, and other expenses (Expenses). Hardwick opened a second dealership, Southern Mountain Adventures (Dealer) and signed a similar contract (Dealer Contract) under which INDS agreed to administer the service contracts and pay for vehicle repairs. This time, however, Hardwick formed a separate entity, Adventure Motorsports Reinsurance (Reinsurer), to hold the claims reserves and, pursuant to a separate Reinsurance Agreement, to reimburse INDS for vehicle repairs. As before, Dealer paid INDS the Contract Cost set forth in the Rate Card. Dealer believed that INDS would then pay the entire amount to Reinsurer. Instead, INDS paid Reinsurer the amount of the cash reserves and, as it had under the MA contract, used the remainder for Expenses. Dealer objected and sought arbitration under the Reinsurance Agreement. Dealer, Reinsurer, and INDS then entered into an Arbitration Agreement specifically to authorize arbitration of Dealer and Reinsurer efforts to recover damages from INDS under the Dealer Contract and Reinsurance Agreement, authorizing the Arbitrator to "grant any remedy or relief that the Arbitrator deems just and equitable." The arbitrator held for Dealer and Reinsurer, finding that the two governing contracts made no provision for INDS to cover Expenses from the Contract Costs or otherwise. The arbitrator found that a "ceding fee" is customarily paid to a reinsurance administrator and awarded damages to Dealer and Reinsurer only in the amount by which he determined INDS's payments for Expenses to be "excessive." INDS was required to pay the damages within 30 days of the Award, after which time the Award would be subject to penalties, including attorneys' fees. INDS sued to vacate, and Dealer filed a cross-motion to confirm, asking the court to enforce the delayed-payment penalty. The court confirmed the award but held that the delayed-payment issue would not be ripe for decision until 30 days following entry of final judgment. INDS appealed the confirmation, claiming that the arbitrator had acted with manifest disregard and overstepped his authority. Dealer and Reinsurer appealed the court's refusal to enforce the delayed-payment penalty. The Court of Appeals reversed the confirmation for manifest disregard, as the arbitrator "explicitly rejected" the Rate Card amounts by deducting INDS's Expenses. The court did not address INDS's alternative overstepping argument or the delayed-payment penalty. The Supreme Court of Georgia reversed, holding that the arbitrator had not acted with manifest disregard in "rejecting" the Rate Card but had instead equitably "interpreted the Rate Card in the overall context" as expressly authorized by the Arbitration Agreement. The Supreme Court remanded the case for consideration of INDS's overstepping claim and the delayed penalty claim.

  On remand, the Court of Appeals of Georgia held that the arbitrator had not overstepped his authority. "Overstepping" is limited in scope and "has been described as addressing issues not properly before the arbitrator." Here, the parties' dispute fell squarely within the Arbitration Agreement, which was signed explicitly for purposes of arbitrating efforts by Dealer and Reinsurer to recover damages under their contracts with INDS "regarding funds generated from sales of vehicle service contracts and subsequent administration of these funds and claims thereafter." The award "was confined to the merits of this dispute, fashioned a remedy contemplated by the parties, and fully addressed the issues presented." The Court remanded the delayed-payment issue to the trial court, directing it to consider the appropriateness of attorneys' fees.

Pennsylvania

- **NEGLIGENCE CLAIMS SUBJECT TO MANDATORY ARBITRATION AGREEMENT**

  Waters v Express Container Services of Pittsburgh, LLC
  Superior Court of Pennsylvania
  2022 WL 10220020
  October 18, 2022

  Under an Agreement with Miller Transport, truck driver James Waters accepted assignments from Miller to pick up and deliver loads with his truck tractor. The Agreement included a mandatory arbitration provision applicable "if a controversy or claim arises out of or relates to this Agreement or operations pursuant to this Agreement." On an assignment from Miller, Waters went to a trucking terminal owned by Express Container Services and, while inspecting the tanker-trailer he was to pick up, slipped and fell from a catwalk, sustaining extensive injuries. Waters filed negligence actions against multiple parties, including Miller. In preliminary objections filed jointly by all the defendants, Miller asserted that the claims against him were subject to mandatory arbitration under the Agreement. The court overruled all the preliminary objections. Miller appealed.

  The Superior Court of Pennsylvania reversed and remanded, holding that Waters' claims against Miller fell within the scope of the Agreement's arbitration provision. The Agreement provided that when Waters accepted an assignment from Miller, he agreed to comply with any agreement entered into between Miller and Miller's customer. Waters conceded that he was working on a job for Miller at the time of the accident and that Miller's customer, Express Container, required him to perform the inspection of the tanker-trailer. The Agreement also required compliance with Federal Motor Carrier Safety Administration regulations, which require inspection of items that are part of the carrier's "operations." The Agreement, therefore, required Waters to inspect the tanker-trailer as part of his work. The broad language of the arbitration agreement, extending coverage to disputes arising out of or relating to "operations pursuant to this Agreement" showed a "clear intent" to encompass all claims arising from Waters' "work under" the Agreement, not just disputes over the Agreement's terms. Waters' personal injury claims, therefore, arose out of "operations pursuant to" the Agreement and were properly subject to arbitration. The Court acknowledged that Waters' claims against Express Container arising from the same incident were not subject to arbitration but noted that "the fact that arbitration would bifurcate Plaintiff's claims and require piecemeal litigation of the same claims in a separate fora" was not a permissible ground for denying arbitration.

New Jersey

- **ARBITRATOR'S INTERPRETATION OF REGULATION REVERSED UNDER DE NOVO REVIEW**

  Jignyasa Desai, D.C., L.L.C. v New Jersey Manufacturers Insurance Company
  Superior Court of New Jersey, Appellate Division
  2022 WL 11418204
  October 20, 2022

  The American Medical Association sets current procedural technology (CPT) billing codes for medical procedures, while the New Jersey Department of Bank and Insurance establishes the fee codes (Fee Schedule) used by insurers for reimbursement. Desai, LLC started a course of treatment for a patient that involved 20 separate nerve conduction velocity (NCV) tests comprised of three different types of tests. The CPT had formerly coded all three tests separately but had consolidated them under CPT code 95913, which was defined as "thirteen or more nerve studies." Under the old codes, the patient would have been billed for a total of $3,079, but under the new CPT code, Desai billed the patient $9,535. The patient's insurer, New Jersey Manufacturers (NJM), had no fee schedule for the new CPT code 95913 and, using the definition of 95913, reimbursed the patient for only 13 tests as the fee set for one of the old test codes, totaling about $3,000. Desai disputed the reimbursement, arguing that, under N.J.A.C. 11:3-29.4(e), NJM should have "cross-walked" the tests back to all three of the old codes, reimbursing

for twenty tests according to those codes. The parties took the billing dispute to APDRA arbitration, where the DRP held that NJM had "sufficiently reimbursed" Desai, as the AMA's CPT schedule had "lowered the value of the testing under the former codes." A DRP panel affirmed, holding that the code language for CPT 95913 capped reimbursement at 13 studies. On appeal, a Law Division judge affirmed. The judge held that the case was "a UCR" case, meaning that liability should not exceed the "usual, customary and reasonable" fee. The judge ruled that it was "not a crosswalk situation" and that he had "no reason to disturb the factual findings" below. Desai appealed

The Superior Court of New Jersey, Appellate Division reversed. The Court applied de novo review, as the dispute involved interpretation of a regulation, and began by noting that the CPT codes are frequently "out of synch" with the Fee Schedule. The plain language of N.J.A.C. 11:3-29.4(e) informs an insurer that its limit of liability for any medical expense not set forth in the fee schedules "shall be a reasonable amount considering the fee schedule for similar services." Where the fee schedule does not contain a reference for similar services, the insurer's liability "shall not exceed the "usual, customary and reasonable" fee. The Court held that Dasai was correct: the new CPT code, 95913, should have been "crosswalked" and billed according to the deleted codes. UCR analysis did not apply, as the DOBI's explanation of N.J.A.C. 11:3-29.4(e) makes clear that UCR analysis applies only if the value cannot be determined by the fee schedule, which was not the case here. The Court remanded the case for an award in favor of Desai but did not award discretionary attorneys' fees, as the issue presented was "novel and unsettled."

Oregon

- **OREGON LAW DID NOT PROVIDE FOR VACATION OF ARBITRAL AWARD ON GROUNDS OF MANIFEST DISREGARD**

  Floor Solutions, LLC v Johnson
  Court of Appeals of Oregon
  322 Or.App. 417
  October 19, 2022

  Floor Solutions terminated its CEO, Patrick Johnson, on grounds of theft, misappropriation, and breach of fiduciary duty. Floor Solutions then sued for a preliminary injunction enjoining Johnson from competing with Floor Solutions, soliciting its customers, or disclosing confidential information. The court denied the motion and granted the parties' stipulated motion to abate and, pursuant to Johnson's employment agreement, transfer the dispute to arbitration. The arbitration panel held for Johnson, finding that Floor Solutions failed to prove that Johnson breached his employment agreement and that Floor Solutions willfully withheld wages and made wrongful deductions from Johnson's paycheck. Floor Solutions sued to vacate the award, claiming that the arbitration panel had exceeded its authority under ORS 36.705(1)(d). The court denied the petition to vacate, issuing a general judgment with money award, as well as a supplemental judgment concerning Johnson's future commissions. Floor Solutions appealed.

  The Court of Appeals of Oregon affirmed. Floor Solutions argued, on appeal, that the arbitration panel acted with manifest disregard of the law in its factual findings. ORS 36.705(1)(d) directs a court to vacate an arbitral award made in excess of the arbitrator's powers but makes no mention of manifest disregard. The Court rejected Floor Solutions' argument that a manifest disregard standard is implied within ORS 36.705(1)(d) as a reason to find that arbitrators exceeded their powers. The Oregon legislature chose to adopt the Revised Uniform Arbitration Act. Commentary to the RUAA recognized that the majority of federal circuit courts recognize a manifest disregard standard, but the RUAA "deliberately chose" to omit that standard as a basis for vacating arbitration awards. As it stands, ORS 36.705(1)(d) applies where arbitrators arbitrate issues outside the scope of the arbitration agreement, and here, neither party disputed that the issues arbitrated fell outside that scope. The Court noted that the Supreme Court has recognized a "narrow exception" to the bar on a trial court reviewing issues covered by an arbitration agreement. That exception applies when the arbitrator makes legal or factual errors "so egregious" as to be said to exceed the arbitrator's authority, and those errors are "so grossly

erroneous as to strike at the heart of the decision-making process." Floor Solutions did not argue that this exception applied in the case at hand. The arbitration panel did not exceed its authority as defined in ORS 36.705(1)(d), and the trial court did not err in confirming the arbitration award.

Case research and summaries by Deirdre McCarthy Gallagher and Rene Todd Maddox.

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